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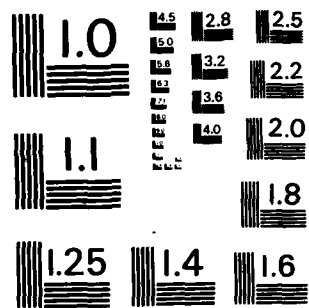
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# Legal Issues for the Commander

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Armed Forces Staff College  
Essays on Command Issues

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# **Legal Issues for the Commander**

**The Commander's Right to Inspect**  
by  
John K. Wallace III

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**Seizure of the Person**  
by  
Herbert Green

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**Judicial Review of  
Officer Evaluation Report Appeals**  
by  
Buren R. Shields III

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**Armed Forces Staff College  
Essays on Command Issues**

1983

**National Defense University Press  
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## **ARMED FORCES STAFF COLLEGE ESSAYS ON COMMAND ISSUES**

In cooperation with the Armed Forces Staff College, the National Defense University Press publishes occasional essays on command issues for distribution to a broad audience of interested readers. In addition, the NDU Press publishes the National Security Affairs Monograph Series, books, studies, issue papers, reports, and conference proceedings.

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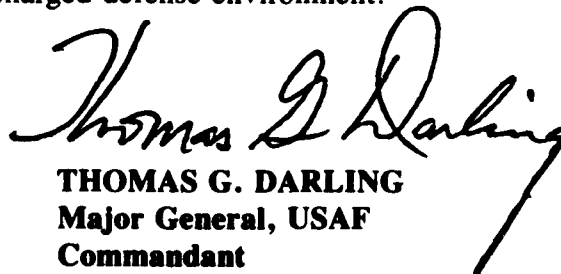


## FOREWORD

The Armed Forces Staff College, under the auspices of the National Defense University, is very pleased to present this collection of essays of current military interest. The publication of this booklet continues a tradition which enjoys a high priority at this institution—that of putting into print some of the best research papers that students write as part of the Staff College course. We are proud to present here the first of a series designed to provide information to commanders concerning problems that regularly confront them.

Legal issues, as most commanders recognize, are among the most complicated and potentially vexing ones that face them today. Not only are the commander's legal decisions highly visible, but they often have a vital impact on unit morale and readiness. The topics addressed here—the right to inspect, seizure of the person, and Officer Evaluation Report appeals—are especially important because litigation in all three areas is increasing year by year, and they involve problems that must frequently be solved on very short notice.

Of course, the information provided here is not intended to substitute for command legal counsel concerning topics such as these, which change and evolve almost day by day. But we urge commanders to use these essays to increase their awareness and understanding. Familiarity with the issues involved should remove some of the pressure that busy commanders must operate under in today's highly charged defense environment.

  
**THOMAS G. DARLING**  
Major General, USAF  
Commandant

# **Legal Issues for the Commander**

**The Commander's Right to Inspect**

## **THE AUTHOR**

*Major John K. Wallace III, US Army (J.D., University of Missouri, Columbia), has served as a member of the Judge Advocate General's Corps since 1971 in the continental United States, South Korea, and Hawaii. From 1978 to 1982 he was assigned as an instructor of military criminal law and as Deputy Director of Academics at the Judge Advocate General's School, Charlottesville, Virginia. Major Wallace is a graduate of the Judge Advocate Officer Graduate Course and the Armed Forces Staff College.*

# I

## THE COMMANDER'S RIGHT TO INSPECT

John K. Wallace III

Every commander in today's military forces is well aware of his ultimate responsibility for achieving unit readiness to ensure that the command is able, willing, and prepared to perform its mission, both in garrison and in combat. Inherent in this responsibility is the authority of the commander to assess unit readiness by inspecting areas, equipment, and personnel under his command. (21462). Frequently, however, a commander is criticized for allegedly violating the legal rights of subordinates in exercising his inspection authority. (34). Until recently, disagreement, indecision, and the absence of any clear rules among military judges and courts have only aggravated the commander's frustration. (302 34). All too often a commander perceives himself to be confronted by a maze of inconsistent and self-defeating legal restrictions affecting his inspection authority.

The purpose of this article is to examine the legal rights of a commander to inspect his command and the competing privacy rights of individual Service members in light of recent developments in military law. It is written with the commander in mind and is intended to assist him in removing the frustration and confusion surrounding his inspection authority.

## THE CONSTITUTIONAL RIGHT TO PRIVACY

The confusion and frustration associated with inspections

#### **4 Right to Privacy**

stems from the inherent conflict between the commander's legal right and military obligation to inspect and the individual's right to privacy and freedom from governmental intrusion. In public areas where no individual privacy right competes with the commander's inspection authority, the commander generally exercises absolute authority. In other areas, such as personal living spaces, the commander's right to inspect must be balanced against the privacy right of the Service member. Thus, in order to define the extent of the commander's right to inspect, we must first examine the nature and scope of the individual privacy right in the military and the legal consequence of the conflict between the rights of the commander and those of the individual.

The right of all citizens to enjoy privacy and freedom from governmental intrusion emanates from the Fourth Amendment of the US Constitution, which provides that

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized (10).

Although the Fourth Amendment describes in general terms the right to privacy and search warrant requirements, it says little about the extent of the right and nothing about the legal consequence of a violation of the right by the government. These important issues were left to the courts to resolve.

#### **THE REASONABLE EXPECTATION OF PRIVACY**

The US Supreme Court has held that the Fourth Amendment protects individuals, not property or places (2:351). Thus, the right to privacy exists wholly apart from any proprietary interest the individual may have in the area into which the government intrudes (6:143). Rather, the right to privacy is a personal right that exists in any area over which the individual claiming the right exercises a "reasonable expectation of privacy" (9:9). Taking this analysis one step further, a reasonable expectation of privacy is said to exist when, first, the individual has a subjective expectation of privacy over the area involved, and, second, that expectation is recognized by society as reasonable under the circumstances (6:143).

The facts of the cases in which the Supreme Court set forth its analysis help to illustrate that analysis. In a 1967 case (2), the defendant was convicted of transmitting wagering information across state lines. At trial, the government introduced transcribed conversations of the defendant, which it had obtained by "bugging" a public telephone booth. The court held that the defendant's rights had been violated even though he had no property interest in the phone booth, since, by closing the door to the booth, he expressed his expectation of privacy, which was reasonable under the circumstances (2:351). In a second case, decided in 1978 (6), police officials stopped an automobile in which the defendant was a passenger. Without sufficient information to obtain a search warrant, the police proceeded to search the car anyway. In the glove compartment, they discovered weapons and ammunition bearing the defendant's fingerprints and clearly implicating him in an earlier armed robbery. In reviewing his conviction, the Supreme Court noted that the police may have violated the driver/owner's right to privacy by searching the glove compartment; however, as a mere passenger in the vehicle, the defendant clearly had no reasonable expectation of privacy as to the glove compartment. Because the right is a personal right, the defendant could not vicariously assert the driver's right to privacy (6:143).

#### PROBABLE CAUSE

The Fourth Amendment expressly recognizes that the individual right to privacy is not absolute. The Supreme Court has construed its language to prohibit only those governmental intrusions that are determined to be "unreasonable" (9:9). The issue in any case in which the government has intruded into a protected area is, therefore, whether, under the circumstances of the particular case, the actions of the government or its agent were reasonable. The largest category of "reasonable" governmental intrusions into protected areas are those effected by law enforcement agents pursuant to a warrant based on probable cause. These intrusions are expressly permitted by the Fourth Amendment and are judicially preferred (2:357).

A full examination of the concept of probable cause is beyond the scope of this article. However, because of the judicial preference for warranted searches based upon probable cause, some ap-

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preciation of the basic implications of probable cause is necessary for a full understanding of the confusion surrounding the commander's right to inspect.

Rule 315(f)(2) of the Military Rules of Evidence, which were incorporated into the *Manual for Courts-Martial* by the President on 1 September 1980, states the present definition of probable cause:

Probable cause to search exists when there is a reasonable belief that the person, property, or evidence sought is located in the place or on the person to be searched. Before a person may conclude that probable cause to search exists, he or she must first have a reasonable belief that the information giving rise to the intent to search is believable and has a factual basis (3:27-29).

This definition of probable cause is not unique to the military (13). The present *Manual* definition paraphrases the leading Supreme Court decision defining probable cause (1) (3:A18-50).

As the definition of probable cause indicates, the information supporting the existence of probable cause must be trustworthy and must also have a basis in fact. Furthermore, the information establishing probable cause must be of sufficient quantity and quality to support "a reasonable belief" or probability that an item or person is actually located at the place to be searched. Thus, mere suspicions or bald allegations will not satisfy the probable cause requirement (3: A18-53). Finally, the person or object sought must somehow be associated with criminal activity in order to be a proper subject of the governmental intrusion and ultimate seizure when found (3:27-30).

Since the concepts of "reasonable expectation of privacy," "reasonableness" of the governmental intrusion, and "probable cause" all relate to the specific factual context in which they arise, it is now necessary to consider these concepts in the military environment (9:10).

### THE RIGHT TO PRIVACY IN THE MILITARY

A Service member does not waive his or her constitutional rights simply by enlisting in the military. However, with respect to the right to privacy in the military, the Supreme Court observed,

"Since the military is, by necessity, a specialized society separate from civilian society, . . . it is foreseeable that reasonable expectations of privacy within the military will differ from those in civilian society" (5:743). Consequently, both the Supreme Court (5) and the US Court of Military Appeals (16) have recognized that the uniqueness of the military environment makes intrusions by the government "reasonable" which in a civilian environment would be prohibited.

In a recent landmark inspection case, the Chief Judge of the Court of Military Appeals observed:

In considering what expectations of privacy a service member may reasonably entertain concerning military inspections, we must recognize that such inspections are time-honored and go back to the earliest days of the organized militia. They have been experienced by generations of Americans serving in the armed forces. Thus, the image is familiar of a soldier standing rigidly at attention at the foot of his bunk while the commander sternly inspects him, his uniform, his locker, and all his personal and professional belongings (24:127).

Thus, overall, a Service member enjoys a reduced right to privacy relative to his civilian counterpart and his commander's right to inspect.

Another facet of military life that reduces the reasonable expectations of privacy is the prevalence of government-owned rather than privately owned property in the living environment of the individual Service member. As noted earlier, an individual asserting a right to privacy need not show a property interest in the area of the intrusion in order to claim the right; however, the presence of such a property interest clearly raises the level of the individual's expectation and the societal recognition of that expectation (6:141). Because the average Service member is continuously surrounded by government property over which he has no property interest, the courts have looked to other indicators in determining whether the Service member has a reasonable expectation of privacy.

Clearly, the individual enjoys a reasonable expectation of privacy as to his own person (14:432) (19:5). The Court of Military Appeals looks beyond the person of the individual to the intended purpose of the government property involved to determine whether the individual may assert a legitimate privacy right. Using this in-



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tended purpose test, the court has ruled that if the government property was issued to the individual for his personal use, the individual may enjoy a right to privacy as to the property involved. Thus, even in the community barracks, the Service member will enjoy a right to privacy within his own living space, including his locker and desk (25:367). Conversely, if the government property was issued to the individual for the performance of official duties rather than personal use, the individual will not enjoy a right to privacy. Using this analysis, the court has determined that an accused has no right to privacy as to the interior of a government vehicle (28:277), as to the interior of a government desk at the work site (33:671) (36:262), or as to the interior of a briefcase issued for official use (23:563).

This analysis of the intended purpose of government property is a critical aspect of the rights of a commander to intrude. If the government property was issued for official use, the individual has no right of privacy to be violated. Accordingly, the commander's authority with respect to this property is absolute.

### THE EXCLUSIONARY RULE

Before we examine the commander's right to inspect in detail, it is first necessary to explore the legal consequence of a violation of an individual Service member's right to privacy. In other words, what happens legally when a commander exceeds his legal right to inspect and unreasonably intrudes upon an individual's constitutional right to privacy?

As indicated earlier, the Fourth Amendment merely states the right to privacy in general terms. It provides no legal remedy to an individual whose right is violated by the government. Until 1914 the courts ignored this problem. Because the government and its agents were immune from civil suits, and there was no logical connection between the defendant's right to privacy and his factual guilt or innocence, the courts simply refused to entertain the issue. This blissful judicial ignorance continued until 1914, when, in a landmark case, the Supreme Court held that evidence illegally seized by the government could not be used at the subsequent criminal trial of the aggrieved defendant (35:395). Oddly enough, the court's rationale for this dramatic ruling was not so much protection of the defendant's rights but rather a desire to prevent the

courts from becoming accessories-after-the-fact to the government's earlier illegal acts (35:394). Subsequent decisions have announced a separate basis for excluding illegally seized evidence, namely, the disciplining of law enforcement officials (hence, the "exclusionary rule") (8:484, 486). The modern rationale of the exclusionary rule is that law enforcement officials are conviction-oriented, and the only effective means of enforcing the constitutional guarantee of privacy is to frustrate the police unless they abide by constitutional rules of engagement in combating crime (4:656).

After promulgating the initial exclusionary rule, the courts found it necessary to declare a subsidiary rule called the "derivative evidence rule" or "poisonous fruit" doctrine (38:476). Under this rule, evidence either seized directly or discovered indirectly as a result of illegal government activity is inadmissible in a criminal proceeding. For example, the government cannot illegally seize documents from the defendant, make copies, return the originals to the defendant, and subsequently introduce the copies at trial (7:342). Similarly, when police discover the identity of a witness as a result of an unlawful search of the defendant's premises, that witness's testimony is inadmissible at a subsequent trial unless the government can establish an independent and untainted basis for discovering the witness (38:376) (26:820).

Both the exclusionary rule and its subsidiary derivative evidence rule have been incorporated into Rule 311 of the Military Rules of Evidence (3:27-21 et seq.).

Because the exclusionary rule is a technical rule of evidence designed to deter unlawful law enforcement activities in criminal proceedings, the courts have generally been reluctant to extend application of the rule to administrative proceedings, such as administrative elimination actions, in which the technical rules of evidence are inapplicable. For example, paragraph 3-7c(7), Army Regulation 15-6, *Procedures for Investigating Officers and Boards of Officers*, 24 August 1977, permits use of evidence in an elimination proceeding which in a court-martial would be barred by the exclusionary rule, so long as the evidence was not seized in "bad faith."

**THE INHERENT AUTHORITY OF A  
COMMANDER TO INSPECT**

**LEGAL RATIONALE AND DEFINITION**

Unlike the warranted search based on probable cause, which is almost always effected by government law enforcement agents in anticipation of criminal prosecution, the inspection is an administrative governmental intrusion into a protected area pursuant to a compelling government interest (15:524). Because searches are made in anticipation of criminal prosecution, the courts strictly enforce the concept of probable cause in determining the reasonableness of the intrusion and ultimate admissibility of the evidence seized (14:423). Legitimate inspections, on the other hand, are designed to protect the government interest involved rather than to fulfill some law enforcement function (31:158). The courts have held that where such intrusions are motivated by a compelling government interest, the individual privacy right must yield to that interest (24:128). Consequently, such intrusions are "reasonable," and evidence inadvertently discovered in the course of a legitimate inspection is admissible in a subsequent criminal prosecution (24:129).

The concept of inspections is not unique to the military. On a daily basis, individuals in the civilian community are subjected to administrative inspections, such as (1) customs and immigration inspections at national borders; (2) agricultural inspections at state lines; (3) vehicle safety inspections; (4) ingress and egress inspections at jails and prisons; (5) briefcase and package inspections at secured public buildings, such as courthouses and the Pentagon; and (6) airport security inspections of passengers and baggage. In each of these cases the intrusion is intended to be preventive, not prosecutorial. It is the legitimate government interest rather than the quantity and quality of incriminating information or the presence of a search warrant that makes the intrusion reasonable (16:176). In view of the lower expectation of privacy in the military noted earlier, the legal rationale in support of traditional military inspections is even stronger than its civilian counterpart (24:128).

For decades the courts have tried without success to devise a

workable definition of inspection (3:A18-38). Such a definition is critical, since the criteria for determining the reasonableness of prosecutorial searches and administrative inspections differ dramatically. In an attempt to resolve the judicial confusion surrounding the definition and characteristics of a legitimate military inspection, the President incorporated Rule 313 of the Military Rules of Evidence in the *Manual for Courts-Martial* (3:27-25) (See Appendix for the provisions of Rule 313). Rule 313 codifies earlier case law and attempts to distinguish legitimate inspections from disguised illegal searches. The Court of Military Appeals has cited portions of Rule 313 with approval (24:132); however, the Court has yet to rule directly on its constitutionality.

From the foregoing, one may synthesize several legal principles concerning military inspections. First, a military inspection is a command function, not a law enforcement function of the commander. It is a means by which the commander assesses the fitness of his unit to perform its mission (19:655). Second, the authority of a commander to inspect his command is inherent in his office and legal responsibilities as a commander (31:159). Finally, evidence discovered in a legitimate military inspection is fully admissible in a subsequent criminal prosecution, notwithstanding the individual's reasonable expectation of privacy (24:132) (3:27-25).

#### INSPECTIONS FOR CONTRABAND

No issue associated with military inspections has caused the courts more difficulty than the inspection for contraband. One of the commander's motivations in conducting such inspections is to discover and eliminate contraband and punish those found to be in possession of it. The difficulty is distinguishing the legitimate inspection from an illegal subterfuge search. This difficulty arises because a commander has inherent law enforcement responsibilities in addition to his inspection responsibilities, and the courts are frequently unable to determine which "hat" the commander was wearing at the time of the intrusion.

Clearly, when a commander is conducting a previously scheduled inspection pursuant to an announced policy of monthly inspections and entertains no suspicions as to any particular individual's possession of contraband at the time of the intrusion, he may seize contraband he inadvertently discovers during the inspection, and

## 12      **Right to Privacy**

that contraband is admissible in subsequent criminal prosecutions (30:156-159) (24:129). Even more spontaneous inspections conducted without antecedent suspicions will yield admissible evidence (15:523). But where the commander uses an inspection as a pretext to confirm suspicions not amounting to probable cause, the intrusion is illegal, and the evidence inadmissible (21:462) (16:175).

Obviously, the line between a legitimate contraband inspection and a pretextual illegal search is a fine one, which turns on the commander's state of mind. A former Chief Judge of the Court of Military Appeals found the issue so perplexing and the distinctions so artificial that he proposed that all evidence found in the course of inspections be held inadmissible (34:405). Rule 313 attempts to clarify the issue with the following language:

An inspection also includes an examination to locate and confiscate unlawful weapons and other contraband when such property would affect adversely the security, military fitness, or good order and discipline of the command and when (1) there is a reasonable suspicion that such property is present in the command or (2) the examination is a previously scheduled examination of the command. An examination made for the primary purpose of obtaining evidence for use in a trial by court-martial or in other disciplinary proceedings is not an inspection within the meaning of this rule (3:27-25).

Stated more simply, if the commander is thinking court-martial at the time of the intrusion, anything he finds is probably inadmissible.

### **INSPECTIONS IN PRACTICE**

No examination of the commander's right to inspect his command would be complete without consideration of some of the practical aspects of inspections.

*Promulgation of an Inspection Policy.* By promulgating an inspection policy, the commander serves notice on members of his command of the nature, purpose, scope, and frequency of inspections. While not extinguishing the right to privacy, such notice will enhance the commander's appearance of reasonableness and reduce, to a degree, the expectation of privacy. Such policies, if followed, are favored by the courts (20) (24).

*Prior Scheduling of Inspections.* By scheduling an inspection, even if unannounced, well in advance of its execution, the commander insulates himself from an allegation that the inspection was a pretext for an unlawful search. It is for this reason that Rule 313 prescribes prior scheduling as one of two legitimate means to accomplish a contraband inspection. If the commander desires to inspect the unit piecemeal rather than all at once, his prior scheduling should include elements to be inspected.

*Scope of the Inspection.* The scope and purpose of the inspection should be determined before the inspection and expressed in the inspection policy. The legitimate "targets" of an inspection include weapons (29:120), contraband (24:130), readiness, security, maintenance of facilities and living conditions, personal appearance, and the presence and condition of equipment (19:655). If the inspection is to focus on weapons or contraband, the "reasonable suspicion" or "prior scheduling" requirements of Rule 313 must be met. In addition, execution of the inspection must be consistent with its scope and purpose (11) (14) (27). For example, the Court of Military Appeals found an inspection to be unreasonable where the stated purpose was to check cleanliness of rooms and the inspecting official examined the contents of the accused's wallet (20:6).

*Use of Drug Detection Dogs.* After several years of conflicting opinions from the courts about using drug detection dogs in inspections, the Court of Military Appeals has recently held that such dogs are simply an extension of the commander's nose, and, therefore, legitimate if the inspection is otherwise proper (24:129). Under this ruling, inspections need not be confined to common areas of the barracks, provided the individual living spaces are within the scope of the inspection. Use of dogs or other detection devices is specifically authorized by Rule 313.

*Ultimate Authority of the Commander.* The preceding analysis of the commander's legal right to inspect has focused on the exclusionary rule and the admissibility of evidence found during the inspection at a subsequent criminal proceeding. As noted earlier, the exclusionary rule is a technical evidentiary rule that is generally inapplicable in administrative proceedings. No analysis of the commander's inspection authority would be complete without recognition of the commander's ultimate authority to inspect regardless of

## 14      **Right to Privacy**

the legal niceties of the exclusionary rule. This ultimate authority to inspect regardless of the subsequent admissibility of evidence has been specifically recognized by the Court of Military Appeals (34:405).

Although recent decisions of the Court of Military Appeals and the promulgation of Rule 313 have significantly increased the likelihood that evidence found during an inspection will be admissible, the ultimate and absolute authority of the commander to inspect irrespective of the rules of evidence cannot be ignored. In this connection, there are occasions when a commander's primary objective in inspecting an individual or area is seizure of contraband, ridding the unit area of distracting influences, or identification of abusers, and not successful criminal prosecution. In such instances, if the commander has conducted the inspection in accordance with Rule 313, the evidence will be admissible at a subsequent court martial. However, even if the commander exceeds his authority under Rule 313, the exclusionary rule determines only the admissibility of the evidence, not the inherent and absolute authority of the commander to inspect.

## **CONCLUSION**

The responsibilities facing a commander today are more awesome and complex than ever before. With ever-diminishing resources and ever-increasing requirements, it is essential that the commander immediately identify problem areas and eliminate environmental influences within his control that detract from the mission. A necessary tool available to the commander to accomplish this identification and elimination is his inherent legal authority to inspect his command.

After several years of confusion and indecision, the legal status of the commander's right to conduct inspections has emerged from a judicial quagmire. Rule 313 and recent decisions of the US Court of Military Appeals have restored the commander's authority and have presented commanders with reasonably clear rules and guidance with which they can live. Commanders and members of the military legal community must now ensure that history does not repeat itself as a result of abusive command practices or defective legal counsel.

## APPENDIX

### *Rule 313. Inspections and Inventories in the Armed Forces*

(a) *General rule.* Evidence obtained from inspections and inventories in the armed forces conducted in accordance with this rule is admissible at trial when relevant and not otherwise inadmissible under these rules.

(b) *Inspections.* An "inspection" is an examination of the whole or part of a unit, organization, installation, vessel, aircraft, or vehicle, including an examination conducted at entrance and exit points, conducted as an incident of command the primary purpose of which is to determine and to ensure the security, military fitness, or good order and discipline of the unit, organization, installation, vessel, aircraft, or vehicle. An inspection may include but is not limited to an examination to determine and to ensure that any or all of the following requirements are met: that the command is properly equipped, functioning properly, maintaining proper standards of readiness, sea or airworthiness, sanitation and cleanliness, and that personnel are present, fit, and ready for duty. An inspection also includes an examination to locate and confiscate unlawful weapons and other contraband when such property would affect adversely the security, military fitness, or good order and discipline of the command and when (1) there is a reasonable suspicion that such property is present in the command or (2) the examination is a previously scheduled examination of the command. An examination made for the primary purpose of obtaining evidence for use in a trial by court-martial or in other disciplinary proceedings is not an inspection within the meaning of this rule. Inspections shall be conducted in a reasonable fashion and shall comply with Rule 312, if applicable. Inspections may utilize any reasonable natural or technological aid and may be conducted with or without notice to those inspected. Unlawful weapons, contraband, or other evidence of crime located during an inspection may be seized.

(c) *Inventories.* Unlawful weapons, contraband, or other evidence of crime discovered in the process of an inventory, the primary purpose of which is administrative in nature, may be seized. Inventories shall be conducted in a reasonable fashion and shall comply with Rule 312, if applicable. An examination made for the primary purpose of obtaining evidence



**16      Appendix**

for use in a trial by court-martial or in other disciplinary proceedings is not an inventory within the meaning of this rule.

# **Legal Issues for the Commander**

## **Seizure of the Person**

## **THE AUTHOR**

*Lieutenant Colonel Herbert Green, USA (J.D., University of Texas), has served as a General Court Martial Military Judge in the United States and Europe. He has also served as a Deputy Staff Judge Advocate and as Chief, Criminal Law Division, the Judge Advocate General's School, US Army. He is a graduate of the Judge Advocate General's School Advanced Course and the Armed Forces Staff College.*

## **II**

### **SEIZURE OF THE PERSON**

**Herbert Green**

Interaction between the individual and the policeman runs the entire spectrum from the merest nod while passing in the street to a full-fledged apprehension, strip search, and confinement. Other encounters on this spectrum, which is "incredibly rich in diversity" (7:13), include a contact, stop, frisk, and pick-up. A contact occurs when a policeman in a public area approaches an individual whom he suspects of an offense and questions him about that offense. A stop is similar to a contact except that the individual is temporarily detained. The frisk is a pat-down of the detainee's outer clothing. A pick-up occurs when a suspect, although not apprehended, is brought or summoned to the police station for questioning.

This spectrum has at least two distinct characteristics. First, it involves a gradual escalation of police control over the individual. Second, it involves a gradual increase in the degree of police intrusion into the privacy of the individual. Police intrusion into individual privacy inevitably raises Fourth Amendment issues because it is that amendment which protects the individual from unreasonable seizures by government officials. The Fourth Amendment to the United States Constitution states:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

An apprehension is the clearest and most obvious form of a seizure of the person. Apprehension is specifically provided for in Article 7 of the Uniform Code of Military Justice (UCMJ), and an entire body of law is devoted to it. The scope of this paper does not include that subject. Instead, this paper examines those seizures of the person entailing contact, stop, frisk, and pick-up, and the Fourth Amendment issues involved with them.

## THE STOP

### TERRY V. OHIO

Prior to 1968, the constitutional prohibition against unreasonable seizures of the person was analyzed in terms of three issues: whether there was an arrest; whether it was based on probable cause; and whether there was a warrant for the arrest (3:208). In 1968, the Supreme Court decided the landmark case of *Terry v. Ohio* and forever changed this relatively simple analytical process.

The facts in *Terry* were uncomplicated. Martin McFadden, a Cleveland police officer, watched Terry and a companion take turns walking back and forth along a city block. During each stroll, they passed and looked in the window of a jewelry store. McFadden, relying on his 39 years of police experience, concluded that the individuals were "casing" the store for a robbery. He approached the suspects and asked them to identify themselves. When Terry mumbled his response, McFadden grabbed him, spun him around, patted down the outside of his clothing, and felt a pistol in Terry's overcoat pocket. McFadden then seized the pistol and apprehended Terry who was subsequently convicted of carrying a concealed weapon; he eventually appealed this conviction to the Supreme Court.

The first issue facing the court was whether the Fourth Amendment applied. The state argued that Terry was stopped and that the pistol was discovered prior to the apprehension. Therefore, no seizure in the constitutional sense had occurred, and the Fourth Amendment was inapplicable. The court rejected this argument and declared:

It is quite plain that the Fourth Amendment governs seizures of the person which do not eventuate in a trip to the station

house and prosecution for crime—"arrests" in traditional terminology. It must be recognized that whenever a police officer accosts an individual and restrains his freedom to walk away he has "seized" that person (7:16).

The court also held—contrary to the state's argument—that a pat-down of the outer surface of an individual's clothing by a police officer was a search.

The next issue, and a more important one for the court, was determining how the Fourth Amendment applied. It resolved this issue by generating a *sui generis* (in a class by itself) seizure called the investigative stop (3:209). The court defined this seizure as "a brief stop of a suspicious individual in order to determine his identity or to maintain the status quo momentarily while obtaining more information" (1:146). To protect the individual from arbitrary stops, the court mandated that the suspicion be reasonable and that it be judged by an objective standard: "Would the facts available to the officer at the moment of the seizure warrant a man of reasonable caution in the belief that the action taken was appropriate?" (7:22). Moreover, when justifying the stop, the policeman would be required to point to specific and articulable facts (7:21). A mere declaration that the individual looked suspicious or that the policeman had a hunch would not suffice (2:52).

The remaining issue was whether McFadden's actions in stopping and patting down Terry were proper. The court held that they were, finding that, on the basis of his observations and his experience, McFadden could reasonably conclude that Terry and his companion were about to rob the jewelry store and that they were probably armed. Accordingly, the stop and the seizure were proper and the conviction was affirmed.

#### RESTRAINT

Often the most critical issue in investigative stop cases is the question whether a stop, a restraint on the freedom of movement, has occurred. The application of restraint is by definition nonconsensual. A law enforcement officer may apply restraint only if he has reasonable suspicion that a crime is occurring or is about to occur (4:314). If he applies restraint without having reasonable suspi-

cion, evidence discovered as a result of the restraint is not admissible in court. However, if the policeman does not restrain the subject, the encounter is called a contact, for which reasonable suspicion is not required. Accordingly, evidence discovered as a result of the contact is admissible even in the absence of reasonable suspicion.

The courts have had difficulty in defining restraint so that, in a given factual situation, it would be relatively easy to determine whether restraint had been applied. In other words, it has been difficult to formulate a test to determine which encounters are contacts and which are investigative stops, that is, seizures.

In *Terry*, the court stated merely that a seizure occurs if, by means of physical force or show of authority, the individual is restrained (7:20). The use of physical force requires no further explanation, but the same cannot be said for the term *show of authority*. A uniformed policeman who approaches a suspect in the street and begins asking questions may have done so by a show of authority. Similarly, the plainclothes policeman who flashes a badge at a suspect may have seized the individual by a show of authority.

In *United States v. Mendenhall*, the Supreme Court recognized that *Terry* did not provide clear guidance on this issue. Accordingly, the court sought to define more clearly the Fourth Amendment concept of seizure. Initially, the court reaffirmed the language in *Terry* but then went further, finding that as long as an individual is free to disregard questions and walk away, he has not been seized (13:509). Moreover, a seizure has not occurred unless, under all the circumstances, a reasonable man would believe that the suspect is not free to leave (13:509). After providing this objective test, the court gave examples of conduct that would constitute seizures. These are the threatening presence of several officers, the display of a weapon, a physical touching of the suspect, and the use of language and tone indicating that compliance with the officer's instructions would be compelled (13:509).

The guidance provided in *Mendenhall* is certainly clearer than that provided in *Terry*. The court, however, appears unwilling to draw a clear line and state that all encounters between suspects and policemen are seizures. Therefore, the issue of what is a contact

and what is a stop, and what is a seizure and what is not, will continue to be a fact-specific question with an elusive answer.

Military law follows the doctrine of *Terry* and *Mendenhall*, that restraint may occur without the use of physical force. The Army Court of Military Review has held that when a criminal investigator approaches an individual whom he suspects is in possession of drugs and demands his identification card, he has restrained that individual. This is so because, under the circumstances, "it flies in the face of reality to conclude that" the suspect would feel free to walk away (10:532).

#### LENGTH OF THE STOP

The length of the stop depends on the facts and circumstances of each case. The Supreme Court has indicated that the stop will be brief but has set no time limit (1:146). Essentially, the test is one of reasonableness: was the length of the restraint under all the circumstances reasonable? The Court of Military Appeals adopted this standard in *United States v. Glaze*.

In that case, a military policeman in Korea saw Glaze off post and asked for his pass. Glaze could not produce the pass he was required by regulation to possess. He was then asked to accompany the policeman to a call box some distance away so the policeman could determine the propriety of Glaze's absence from his unit. One of the issues facing the court was whether an individual, such as Glaze, who was restrained but not apprehended, could properly be taken to a call box and detained for the time it took to accomplish this procedure. The court found that the policeman reasonably suspected Glaze was off post without permission and that it was reasonable to detain him for the brief period needed to check his status. Accordingly, the length of the restraint applied in this case was proper (11:178).

#### REASONABLE SUSPICION

Reasonable suspicion is that degree of information permitting a reasonable person to conclude that criminal activity is afoot (4:314). In determining whether reasonable suspicion existed at the time of the seizure, a court may consider the policeman's personal observations (7:28) and the information he gains from reliable



sources (1:147). Moreover, the policeman may use his experience (7:30), apply this experience to seemingly innocuous facts, and draw conclusions that one not trained in law enforcement might not draw (9:629). Thus, in *Terry v. Ohio*, Officer McFadden was permitted to draw the conclusion that the accused, while pacing up and down a street, was in fact preparing to commit a robbery.

Reasonable suspicion is the *sine qua non* for the application of restraint. Unless the law enforcement authority reasonably suspects that the individual has engaged in criminal activity or is about to do so, he may not restrain him (2:51).

The determination of what is reasonable suspicion is not easy to make. Reasonable suspicion cannot be established unless the policeman can point to specific and articulable facts that lead him to conclude that the individual should be restrained (7:21). *Terry v. Ohio* is an example of how the requirement of specific and articulable facts may be met. *Sibron v. New York* and *Brown v. Texas* are excellent examples of the failure to meet this requirement.

In *Sibron*, a New York policeman observed the accused continually from 1600 to 2400 hours. During this period, the accused was on a city street and had several discussions with individuals known to the policeman as narcotics addicts. At approximately midnight, the accused entered a restaurant and conversed with another known narcotics addict. The policeman then grabbed Sibron, searched him, and found drugs. In reversing Sibron's conviction for drug possession, the Supreme Court stated that an inference arising from the mere knowledge that an individual talks to narcotics addicts, especially when the policeman is not privy to the subject of the conversation, "is simply not the sort of reasonable inference required to support" a police intrusion into an individual's privacy (6:62).

In *Brown*, the accused was seen with another man in an alley in a neighborhood frequented by drug users. At the accused's trial the policeman testified that the accused looked suspicious. The Supreme Court reversed the conviction because the government failed to present specific and articulable facts to support the police intrusion (2:52).

The requirements for reasonable suspicion and the establishment of it by specific and articulable facts are sound. They repre-

sent a good and practical compromise between the individual's right to privacy and legitimate law enforcement interests: the individual is protected from the unfettered actions of the police, and the police are not required to meet the higher standard of probable cause before they can impose restraint. Although the determination of what constitutes reasonable suspicion in a particular case is not an easy one, the Supreme Court has given enough guidance so that the task is far from impossible.

#### THE STOP AND ARTICLE 31

There is a significant difference between a stop by a civilian policeman and one by a military policeman. The Fifth Amendment to the Constitution requires that when an individual is apprehended or deprived of his freedom of movement in a significant way, the police must warn him of his right to remain silent and his right to counsel before he may be interrogated (5:444). A stop is not considered a significant deprivation of liberty under the Fifth Amendment. Therefore, the civilian policeman need not give a stopped suspect warnings before he begins to question him (15:692).

Military law is different. Article 31, UCMJ, requires that any time a suspect is questioned, the warning provided by that article must be given. Thus, when a military policeman stops an individual, he may not question him until he gives the Article 31 warning (15:692).

Whether the warning requirement renders the military stop less effective than the civilian one is difficult to measure. Experience shows that warned suspects frequently reveal information and confess to a crime and that unwarned suspects often remain silent and give no information. Although the effect of this difference is debatable, the existence of the difference is a fact that certainly must be recognized by the military law enforcement authority.

#### THE FRISK

Although the words "stop" and "frisk" are very often paired to describe a single legal phenomenon, they are in reality discrete, albeit related, concepts. The stop, as noted above, is the restraint

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of the individual. The frisk is a search of the person that may occur after the person is stopped (4:314). The justification for a stop does not automatically provide a legal basis for a frisk. The individual may be frisked only if the policeman has reasonable suspicion, based on specific and articulable facts, that the suspect is armed and dangerous (4:314).

The scope of the frisk involves the balancing of competing interests and is a question of constitutional dimension (3:209). On the one hand is the need for the policeman to protect himself from an individual whom he believes to be armed and dangerous (7:24). On the other hand is the Fourth Amendment right of the individual to be free from a search that is not based on probable cause (3:209). Since probable cause is a degree of evidence greater than reasonable suspicion, the constitutional question is what kind of search may be based on this lesser standard of evidence. The Supreme Court has answered this question by declaring that a pat-down of the outer clothing of the suspect by the policeman will reasonably protect the policeman and still secure the basic privacy right of the suspect (6:65). If during the pat-down the policeman discovers a weapon, he may intrude further into the clothing of the suspect and seize the weapon (7:30).

The key to understanding the concept of the frisk is that it represents greater intrusion into individual privacy than does a stop. Therefore, the policeman must have additional information before he may frisk the stopped suspect. Moreover, the scope of the frisk is limited because the policeman need not possess, and often does not possess, the amount of information required by the Constitution to conduct a full-fledged search.

## THE PICK-UP

An almost daily event in military life is a phone call from a criminal investigator to a first sergeant requesting that a soldier, suspected of a crime, be sent to the criminal investigator's office for questioning. The call is inevitably followed by an order from the first sergeant to the soldier to report immediately to the police office. If the sergeant gives the order without probable cause to believe that the soldier has committed an offense, the order is in ef-

fect an illegal seizure of the person (16:537). Because the seizure is illegal, evidence obtained as a result of it may not be admissible in court (3:218).

In both the military and the civilian spheres, the pick-up may also be accomplished by policemen who take suspects against their will to the police station for questioning. If probable cause to believe the suspects have committed a crime is lacking, the actions of the police are illegal seizures (3:216, 16:538).

In *United States v. Spencer*, the Army Court of Military Review explained how to avoid these illegal seizures. Spencer was suspected of larceny. Military police investigators appeared at his barracks and requested that he come to the police station for questioning. He was told he could use his own car; when he said he did not have one, he rode with the police. He was neither hand-cuffed nor frisked and was not at any time treated as under apprehension. In upholding this procedure, the court noted that Spencer's trip to the police station was voluntary and that at all times he was free to leave. Therefore, his appearance at the police station was voluntary and not the result of a seizure of the person (14:542). Evidence obtained as a result of his appearance was admissible in court.

## CONCLUSION

Seizures of the person are probably the most common incidents of constitutional magnitude occurring in our daily lives. Yet the law pertaining to them is at times unclear and relies in large part on the vagaries and nuances of a particular situation. In promulgating the law and in interpreting the Constitution, the Supreme Court has been compelled to balance great competing interests. The right of the policeman, who protects all of us, to protect himself is certainly worthy of great consideration. The competing interest, the right of the individual to be free from unwarranted government intrusion, is so important that it is enshrined in the Constitution. The balance struck by the Supreme Court is a good one. Although the court has not given us a rule etched in stone that may be easily applied in every situation, it has given us clear categories and rules based on the concept of reasonableness. By permitting seizures to be made on evidence that does not amount to

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probable cause, the court has permitted society to take substantial measures to protect itself. And by placing reasonable restrictions on those seizures, the court has enabled us to preserve the great rights we sought to protect when we adopted the Fourth Amendment.

# **Legal Issues for the Commander**

**Judicial Review of  
Officer Evaluation Report Appeals**

## **THE AUTHOR**

*Major Buren R. Shields, III, USA (J.D., University of Utah College of Law), is a member of the Judge Advocate General's Corps. From 1979 to 1981, he served in the Military Personnel Branch, Litigation Division, Office of The Judge Advocate General. There his responsibilities included defending the Department of the Army in lawsuits filed in the United States Court of Claims by officers and former officers seeking judicial review of unsuccessful administrative appeals of Officer Evaluation Reports. Major Shields is a graduate of the Infantry Officer's Advanced Course and the Armed Forces Staff College.*

# **III**

## **JUDICIAL REVIEW OF OFFICER EVALUATION REPORT APPEALS**

**Buren R. Shields III**

With increasing frequency, military officers obtaining unsatisfactory results from administrative appeals of Officer Evaluation Reports (OERs)\* are seeking judicial review of their complaints. But judicial review of OER complaints is limited, and most officers have no way of knowing which complaints the courts will review on the merits of the case. As a result, a significant number of officers endure the expense and discomfort of litigation only to have their claims rejected as nonreviewable. In addition, the increase in lawsuits aggravates already crowded court dockets and further delays the receipt of decisions and relief by those with reviewable claims.

The United States Court of Claims and the United States District Courts are the federal courts that exercise judicial review over OER complaints. This essay addresses only the Court of Claims (hereinafter the Court) and is designed to provide the military officer with an overview concerning (1) which OER complaints are re-

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\*Officer Evaluation Report (OER) is the Army's nomenclature for its officers' evaluation reporting form. The nomenclature of such forms and the regulations pertaining thereto differ among the military Services, but judicial review is applicable to all military Services.



viewable; (2) what standards and elements of proof must be satisfied to obtain judicial relief; (3) how failure to proceed with diligence can bar recovery on reviewable and meritorious claims; and (4) what relief can be expected if a claim is successful. This essay is intended only to provide a background knowledge of the area and should not be regarded as a substitute for legal advice in any particular case.

## **JUDICIAL REVIEW**

To obtain judicial relief in the Court for OER complaints, a plaintiff must establish that (1) the challenged OER was defective as a result of "legal error" or reviewable "injustice" and (2) an adequate connection existed between the OER and an adverse action with monetary consequences to him (3:3). These two requirements encompass several significant hurdles to judicial relief.

### **A PROPER PLAINTIFF**

An officer may not challenge an OER in the Court until he has been separated from active duty.\* Under 28 U.S.C. § 1491 (1972), no complaint may be reviewed unless the plaintiff points to a federal statute granting him an entitlement to a specific sum of money that is past due from the federal treasury (7:809, 8:740). In OER appeals, this requires that a plaintiff assert a back-pay claim. The statute granting entitlement to military pay is 37 U.S.C. § 204 (1976). It confers on each officer an entitlement to the pay of his appointed rank until the time he is *properly separated* from the Service (7:810). Federal statute 10 U.S.C. § 631 and 632(1982) requires that an officer twice passed over for promotion be retired, if eligible, or separated from active duty\*\* (9:827, n.2). Thus, to achieve the requisite back pay claim under 37 U.S.C. § 204, the plaintiff must assert that the passovers on which his separation was based were illegal because they resulted from consideration of his record when it contained the defective OER.

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\*Before that time, judicial review, if available at all, must be sought in a United States District Court (7:810, n.10).

\*\*Before 13 September 1981, some Service regulations also required separation after two passovers for temporary promotion.

## A REVIEWABLE ERROR

Not all OER complaints are reviewable by the Court. Each Service has a Board for Correction of Military Records (the Board) at the apex of its administrative appeal process. Prior resort to the Board is not mandatory for judicial review, but it may increase the scope of the complaint that the Court may review and enhance the plaintiff's likelihood of having an OER voided.

Except on appeal of a Board decision, the Court may review complaints that OERs are defective only if there is "legal error," for example, executed in violation of a specific objective requirement of statute, regulation, or published mandatory procedure of a substantive nature (7:811, 5:708). The Court may also review Board decisions (7:812). The Board has an additional authority, and a duty, to remove "injustices" and to grant "complete relief" whenever it voids an OER as unjust (7:812-813, 5:706). Thus, if the Board determines that an OER was not unjust or decides to void the OER but not an allegedly related passover, the Court may review the decision on appeal (7:811-813). On such appeals, the Court, in addition to reviewing for legal error, may also review and void OERs as unjust, but only if they are defective because of (1) "the presence of factors adversely affecting the ratings which had no business being in the rating process"; (2) a "misstatement of a significant hard fact"; or (3) a gross material error of fact or an action contrary to all evidence"\* (5:708, 2:12).

The Boards have also voided OERs on bases that the Court does not consider reviewable injustices. Examples of such situations are those in which the substance of the complaint is that the OERs (1) were unjust, inaccurate, incomplete, or subjective; (2) were intentionally downgraded in order that the officer would show job progression; (3) were not truly representative of the officer's performance; (4) failed to mention some of the officer's significant accomplishments; or (5) reflected a numerical rating inconsistent with the narrative evaluation (7:808, 5:707, 2:6-10).

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\*Although the Court announced this basis for reversal in a February 1979 decision, it has not yet granted relief under it.

Several other factors should be considered by officers contemplating appeal to the Court. Appeal of a Board decision is not a trial *de novo* of the issues. This means that the judge is not free to substitute his judgment for that of the Board and reach a conclusion based solely on the evidence as he sees it (2:11). The Court will not substitute its judgment for that of the Board on whether a particular situation was unjust "when reasonable minds could reach differing conclusions" (7:814). Instead, the plaintiff is bound by the Board's decision unless he can meet the difficult burden of overcoming the strong, but rebuttable, presumption that the Board and the rating officers discharged their duties correctly, lawfully, and in good faith (7:813). To do so, he must prove by clear and convincing evidence that the Board's decision was arbitrary, capricious, in bad faith, unsupported by substantial evidence, or contrary to law (7:811).

No effort has been made in this essay to offer a complete list of nonreviewable OER complaints. But understanding the rationale behind the Court's refusal to increase the scope of judicial review over such claims should aid the potential plaintiff in assessing the reviewability of his claim.

The Court accepts two precepts about review of military functions. First, the Constitution charges the executive branch of the government—not the judiciary—with running the military. The Court recognizes that its function is not to second-guess rating officers, but, instead, to be scrupulous in its interventions in the rating process (2:11–13). "Strong policies compel the Court to allow the widest possible latitude to the armed services in their administration of personnel matters" (7:813).

Second, the Court realizes that the rating process is inherently subjective and involves discretionary judgments and evaluations by the rating officers (2:11–12). For that reason, it admits that perfect objectivity in reports cannot be expected or even hoped for (2:11). Most important, the Court recognizes that the rated officer is entitled to no more than the rater's view of performance as he chooses, *at the time of the report*, to articulate, score, and exemplify it (2:13). "It is the rater's view that counts in the end, absent legal error" (2:13). "This court cannot make perfect a system that the

military themselves in their regulations allow to exhibit imperfections, which may or may not be inherent in the nature of the system'' (8:741). This is why the Court has consistently refused to review claims of inaccuracy in which raters subsequently came forward with statements that they had rated the plaintiff too low, had failed to account for inflation in the rating system, had paid slight personal attention to the plaintiff's performance of duty, or had failed to include pertinent information in the report (5:708).

It should also prove helpful to examine in further detail some of the categories of OER complaints reviewable without prior Board consideration and to dispel any misperceptions about their scope.

One such category is the introduction into the rating process of irrelevant factors (5:708). An allegation that an OER was downgraded as a result of improper command influence on the rater is within this category (3:3) but is difficult to establish. Only proven improper command influence is error, and the plaintiff has the burden of proof. To establish improper command influence, "the evidence must clearly demonstrate that the rater's prerogatives were violated by undue pressure or coercion" (3:4). Evidence that an indorser acknowledges instructing a rater to modify his rating is insufficient. There are various circumstances in which such instructions are acceptable and may not violate the rater's prerogatives. For example, the OER may have been returned with the comment that without additional justification the indorser could not concur in the rating, and upon independent reassessment, the rater determined that he had overrated his subordinate's performance (3:4, n.4).

Bias and personal animosity of the rating officers toward the rated officer are also within this category. But evidence of a single and casual expression of dislike by the rater or evidence that the rater and indorser belonged to a social clique of which the rated officer was not a member is not sufficient to establish bias (5:708). By contrast, evidence of several specific incidents in which the rater expressed personal animosity and bias because, for example, the rated officer had a foreign wife may be sufficient (5:708). The plaintiff must also establish that the challenged rating *resulted from*

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bias rather than from his duty performance (4:871). When the plaintiff presents evidence of bias in the indorser but not in the rater, the same rating from the rater tends to discredit an argument that the indorsement was the product of bias rather than duty performance (4:871).

Alleged regulatory violations must involve a specific objective requirement of the regulation. For some regulations the requirement is clear, such as those that require OERs be signed by the rating officer (5:707, n.5) or a reasonable rebuttal opportunity be given prior to record filing of an "adverse" OER (10:7, 8:738). For other regulations, the requirement is more subtle. For example, a regulation might state: "Evaluators are prohibited from using or considering evaluation reports rendered in previous reporting periods" (3:5). But alleging that the rater used key words and phrases from prior OERs in preparing the challenged OER does not constitute a violation:

It is no surprise that senior military officers called upon to evaluate a subordinate, harken back to golden phrases used on prior occasions. So long as these key words and phrases are used in a dictionary sense and not as a yardstick for reviewing the subordinate's performance, we find no violation of the regulation (3:5).

#### AN ADEQUATE NEXUS TO A SEPARATION

After persuading either the Board or the Court to void an OER, a plaintiff must still establish an adequate connection between that OER and the passovers causing the separation that supports his monetary claim. An officer has no right to be considered for promotion on the basis of an error-free record. Instead, he has only a more limited right to be considered on a "substantially complete and fair" record (7:814). Some plaintiffs may not have been competitive for promotion even without the challenged OER. The Court cannot function as a super selection board and determine a plaintiff's subjective promotability with exactness (that is, determine whether "but for" the OER he would have been promoted). Therefore, in assessing the evidence on this element, the Court focuses on two "subordinate and limited questions": (1) whether the presence of the defective OER caused the plaintiff's record as a whole to portray his career in less than a substantially fair and com-

plete manner, and (2) whether the plaintiff's comparative position before the selection board was such that, even assuming some prejudice from the defective OER, it was unlikely that he would have been promoted in any event (5:710).

The factors the Court examines in answering the first of these questions vary. But there are a number of relatively objective factors that have been used repeatedly. The Court readily acknowledges the danger of relying on numerical ratings (5:710, n.15), yet most of these factors involve that portion of the OER: (1) was there a significant variation in the plaintiff's average numerical rating with and without the defective OER? (2) did the defective OER disturb a picture of otherwise steady advancement and increased competence? (3) did the OER cover a period of particular significance like active-duty combat or a period after temporary promotion to the grade for which this selection board was considering him for permanent promotion? (4) what percentage of the OERs in his total record and of those at his current grade did the defective OER comprise? (5) was the defective OER an older one so that any prejudice from its presence could be expected to have been lessened by more recent OERs? (6) was the defective OER the lowest the plaintiff ever received? and (7) was there a pivotal qualitative factor present, such as a particularly prejudicial remark? (5:710-711).

Defective OERs may also prejudice a plaintiff's record other than by their presence. If the officer's record has gone before a selection board after the Board has voided one or more defective OERs, a gap will be apparent in his record of performance. The failure to place a nonprejudicial explanation of this gap in his records before the selection board may be enough to cause the Court to find the requisite prejudice (7:824). Similarly, if the plaintiff was released from active duty for failure to achieve permanent promotion, the presence in his record of a tainted passover for temporary promotion may sufficiently prejudice his record, even if the defective OERs were themselves removed prior to the review of his records by the permanent selection board (7:819).

In answering the second question, the Court evaluates the likelihood of the plaintiff's promotion without the error. It attempts to balance the amount of prejudice it perceives from the defective

OER against an assessment of the plaintiff's competitive position before the selection board (4:872-874). Determining the factors to consider in answering this question has been difficult for the Court, and some that it has delineated are of limited use. Some are broad generalizations: for example, "the presence of passovers in a record is a grave handicap to an officer's promotion opportunities" (5:711). Depending on how each Service structures its promotion procedures, the validity of such generalizations will vary. For example, the Army places its selection board members under sworn instructions not to consider prior passovers in making promotion recommendations; thus this generalization would seem to have little validity.

Ascertaining the plaintiff's position before a selection board may be determined relatively objectively in one Service and totally subjectively in another. For example, the Air Force maintains data from its selection boards in a format permitting a cutoff point for promotions and the plaintiff's relative position to that cutoff point, both in terms of average OER score and the number of officers between him and the cutoff (4:873, 5:711). The Army does not maintain such data (2:13). Thus, in marked contrast to its Air Force cases, the Court has not yet developed any analysis for determining the likelihood of promotion in its Army cases that is distinct from its assessment of error impact on the plaintiff's record.

### **LACHES: A DEFENSE AGAINST MERITORIOUS CLAIMS**

Most officers with OER complaints know that the "statute of limitations" bars untimely lawsuits. Under 28 U.S.C. § 2501 (1976), suit must be filed, with some limited exceptions, within six years after the claim "accrues," which is usually upon separation from active duty. But they do not realize that judicial relief, even for reviewable and meritorious claims, may be barred even earlier by the doctrine of "laches." Under laches, relief may be barred by unexcused delay in filing a plaintiff's lawsuit which results in prejudice to the government's ability to meet his claim or to minimize his recovery.

Delays resulting from timely and diligent pursuit of an appeal

(including permissive forums like the Board) or periods when a plaintiff is unable to pursue his claim are excusable. All other delays are unexcused.

Prejudice will be found when important witnesses have died or become unavailable or when the government can no longer locate documents or evidence pertinent to the plaintiff's contentions. Delay increases the number of years for which the government will owe a successful plaintiff back pay without receiving any actual service in return. This delay also constitutes prejudice (1:5).

Laches is a defense, and normally the government has the burden of proving prejudice. But for longer delays (that is, those approaching six years), prejudice will be assumed, and the burden will shift to the plaintiff to prove a lack of prejudice (1:5). Whether prejudice will be assumed is determined on a case-by-case basis.

Plaintiffs are accountable for delay beginning with the date they were on notice of their underlying claims (that is, from the error in the challenged OERs, rather than from separation) (1:4). In a recent case, the plaintiff, who was discharged in 1975, filed an administrative appeal within 20 months of his separation and appealed that decision within three months of being notified of it in 1980. But prejudice was assumed, and laches barred his recovery because the offending OERs were issued in 1962 and 1963 and the passovers causing his separation occurred in 1973 and 1974 (1:2-3).

## **RELIEF AVAILABLE FROM THE COURT**

For many officers with OER complaints, the decision to seek judicial review may turn on their assessment of whether the merits of their claim, and the relief they expect, justify the effort and expense. These officers should not hesitate to sue under any misperception that the relief available in the Court is less than complete. If successful in his lawsuit, such an officer could expect (1) constructive active-duty service credit for pay and retirement purposes from the date of his illegal separation; (2) reinstatement to active duty in the commissioned grade held on the date of separation or



placement on the retired rolls, whichever is appropriate; (3) back pay for any periods of constructive active-duty or retired status; (4) record correction, including removal of any defective OERs and passovers for promotion and the insertion of nonprejudicial explanations in his record of any gaps created by voided OERs or promotion nonselections and covering the period of any constructive service credit; and (5) if restored to active-duty status, promotion consideration by the next regularly scheduled selection boards corresponding to those issuing any voided passovers. (7:820, 9:832, and 6:445). The Court would not, however, direct that a successful plaintiff be promoted. Promotion results from the exercise of discretionary functions reserved for the executive branch of government by the federal Constitution. The Court is powerless to include promotion in any relief that it directs (4:874-875).

## **SUMMARY**

Judicial review of unsuccessful administrative appeals of OERs is available under certain circumstances in the United States Court of Claims. A plaintiff must be able to demonstrate a qualifying claim for monetary damages against the federal treasury and must allege the existence of "legal error" or an "injustice" rendered reviewable through prior appeal to his Service's Correction Board. To obtain relief once he has established a reviewable claim, he must prove the error or injustice and establish an adequate nexus between it and his discharge from active duty. Finally, he must insure that his lack of diligence in pursuing his claim does not prevent him from obtaining relief for a meritorious and judicially reviewable claim.

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